88-1084

No. ___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

DR. E.G. FISCHER,

Petitioner,

vs.

BAR HARBOR BANKING & TRUST COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

What is the scope of the discretion of federal judges in deciding whether to certify an unsettled question of state law to the highest court of the state?

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No. _____

In The

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DR. E.G. FISCHER,

Petitioner,

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BAR HARBOR BANKING & TRUST COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Dr. E.G. Fischer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above-entitled proceeding on September 9, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 857 F.2d 4 and is reproduced in the Appendix to this petition. The Memorandum and Order Accepting the Magistrate's

Recommended Decision is reported at 673 F. Supp. 622 and is reproduced in the Appendix to this petition.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1332(a)(1), the petitioner, a resident of Massachusetts, brought this suit against respondent, a Maine corporation, in the Federal District Court for the District or Maine on May 24, 1985. On September 22, 1987, the District Court granted respondent's motion for summary judgment on all issues.

On petitioner's appeal, the United States Court of Appeals for the First Circuit on September 9, 1988 entered a judgment and order affirming the decision of the District Court.

A timely motion for rehearing was denied on October 5, 1988. The petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Dr. E. G. Fischer, entered into a contract on September 19, 1983 with Ocean Cruising Yachts of Maine, Inc. ("OCY") for the construction of a sailboat for a price of $172,500. Dr. Fischer made periodic progress payments, beginning with a 15% down payment and totalling $112,125 through March 27, 1984. Early in May, 1984 Dr. Fischer was informed by Henry R. Hinckley, III, president

of OCY, that OCY was overdue on its loans to the Bar Harbor Banking and Trust Company ("Bank") and that the Bank claimed a lien on his boat as well as the three other boats then being constructed by OCY. The Bank's position was confirmed in writing by John Reeves, vice-president and treasurer of the Bank, who wrote to the petitioner on June 13, 1984, stating that the Bank claimed a lien on his boat and would release its lien only upon payment by him of $50,000 to the Bank. This $50,000 was over and above the contract price for the boat. The petitioner resisted paying on the advice of his counsel that petitioner was a "buyer in ordinary course" under Article 9-307(1) of the Uniform Commercial Code (11 M.R.S.A. § 9-307(1)) and that as such, he took free and clear of any lien asserted by the respondent Bank. In late July, 1984, Hinckley signed a bill of sale, transferring title in the boat from OCY to petitioner but containing the following notation: "Manufacturers Warranty and Title is Given Subject to Bank Lien."

After attempts to settle the matter out of court, petitioner, a Massachusetts resident, filed a complaint against respondent Bar Harbor Banking and Trust Company, a Maine Corporation, in the Federal District Court in Bangor, Maine on May 24, 1985. Through his complaint, Dr. Fischer sought to collect compensation for damages suffered by him for slander of title to his boat and for the intentional infliction of emotional distress. Petitioner also sought punitive damages and a judicial declaration that the Bank had no lien on his boat which was prior in right to his own rights in the vessel as buyer. On September 27, 1985, petitioner moved for partial summary judgment. On October 28, 1985, respondent moved to dismiss the

complaint or for summary judgment on all issues. On September 29, 1986, the United States Magistrate recommended the granting of respondent's motion for summary judgment and the dismissal of petitioner's claim for damages. On September 22, 1987 the District Court (Cyr, D.J.) accepted the Magistrate's Recommended Decision and ordered that respondent's motion for summary judgment on all issues be granted and that petitioner's motion for partial summary judgment be denied. On October 19, 1987, Dr. Fischer appealed the judgment of the District Court, pursuant to 28 U.S.C. § 1291, to the United States Court of Appeals for the First Circuit. The First Circuit affirmed the District Court on September 9, 1988.

REASONS FOR GRANTING THE WRIT

Introduction

In *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207 (1960), this Court praised the Florida legislature's "rare foresight" in enacting the first certification statute. In *Lehman Brothers v. Schein*, 416 U.S. 386 (1974) this Court, speaking with a unanimous voice, clearly endorsed certification to state courts of unsettled questions of state law. In that case this Court noted that in the long run certification "save[s] time, energy and resources and helps build a cooperative judicial federalism." 416 U.S. at 391.

Given this encouragement, and particularly following *Lehman*, 36 states have adopted provisions for certification, many of them modeled on the Uniform Certification of Questions of Law Act.[1]

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[1] 12 U.L.A. 52 (1967). Alabama: Const., Art. VI, Sec. 6.02(b)(3), ratified 1973; Alaska: App. R. 407; Arizona: Ariz. Rev. Stat. Ann. Secs. 12-1861-12-1867, enacted 1984; Colorado: App. R. 21.1, effective June 24, 1976; Connecticut: Pub. Law No. 85-111, effective Oct. 1, 1985; Delaware: Del Const. art. iv, Sec. 11(9), 1983; Florida: Fla. Const. Art. V, § 3(b)(6), 1980; Georgia: Ga. Code Ann. Sec. 15-2-9, 1977; Hawaii: Haw. Rev. Stat. Sec. 602-5(2), 1980; Idaho: App. R. 12.1, 1981; Illinois: Sup. Crt. R. 20, 1983; Indiana: Ind. Code Ann. Sec. 33-2-4-1, 1971; Iowa: Iowa Code Ann. Secs. 684A.1-684A.8, 1980; Kansas: Kan. Stat. Ann. Secs. 60-3201 to 60-3212, 1979; Kentucky: R.C.P. 76.37, 1978; Louisiana: La. Rev. Stat. Ann. Sec. 13-72.1, 1972; Maine: 4 Me. Rev. Stat. tit. 4, Sec. 57, 1981; Maryland: Md. Cts. & Jud. Proc. Code Ann. Secs. 12-601 to 12-609, 1973; Massachusetts: Sup. Jud. Crt. R. 1:03,1971; Michigan, Mich. Ct. R. 7.305(B), 1976; Minnesota: Minn. Stat. Ann. Sec. 480.061, 1973; Mississippi: S. Ct. R. 46, 1980; Montana: S. Ct. R. 1, 1969; New Hampshire: S. Ct. R. 34, 1982; New Mexico: N.M. Stat. Ann. Sec. 34-2-8, 1975; North Dakota: N.D. R. App. Pro. 47, 1977; Oklahoma: Okla. Stat. Ann. tit. 20, Secs. 1601-1613, 1973; Oregon: Or. Rev. Stat. Secs. 28.200 to 28.255, 1983; Rhode Island: S. Ct. R. 6, 1974; South Carolina: S.Ct. R. 46, 1982; South Dakota: S.D. Codified Laws Ann. Secs. 15-24A; Washington: Wash. Rev. Code Ann. Secs. 260.010 to 260.900, 1965; West Virginia: W. Va. Code Secs. 51-1A-1 to 51-1A-12, 1976; Wisconsin: Wis. Stat. Ann. Secs. 821.01 to 821.12, 1983; Wyoming: Wyo. R. App. Pro. 11.01 to 11.07, 1978.

I.

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISION IN *LEHMAN BROTHERS v. SCHEIN.*

The court below denied petitioner's request to certify questions of state law on which there was no controlling state precedent on the following ground:

> "we find Fischer's request for certification particularly inappropriate here. As plaintiff, he had knowledge of the state of the law under his theories for recovery, and had the choice of forums to file suit, either in the local courts or the federal court under diversity jurisdiction . . . " (App. 24)

In support of this position the court cited its decision in *Cantwell v. University of Massachusetts,* 551 F.2d 879, 880 (1st Cir. 1977) where it first pronounced its policy on certification in diversity cases:

> "the bar should take notice that one who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification."

What the First Circuit is saying is that certification is not available to resolve uncertain questions of law in a diversity case where requested by the plaintiff.

The First Circuit's policy significantly restricts the availability of certification in diversity cases. *Lehman* was a diversity case. Yet there is not one word in that case which hints at this substantial limitation. In fact, the thrust of *Lehman* is that certification should be encouraged, not discouraged.

The First Circuit's position is particularly troublesome since almost 65 percent of all certified questions emanate from diversity cases. C. SERON, CERTIFYING

QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES 7 (1983). Thus, if it were more widely adopted, the First Circuit's position would strangle at birth a process which has been strongly endorsed by this Court and a majority of state jurisdictions.

II.

THE POLICY OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT REGARDING CERTIFICATION IS IN CONFLICT WITH *LEHMAN'S* GOAL OF "COOPERATIVE JUDICIAL FEDERALISM."

The State of Maine has made statutory provision for the certification of questions of state law from federal courts where a federal court has "before it one or more questions of law of this State, which may be determinative of the cause and there are no clear controlling precedents in the decisions of the Supreme Judicial Court. . . ." 4 M.R.S.A. § 57. Nothing could be clearer from this statutory provision than that it is the policy of the State of Maine that its courts have the opportunity to pass on issues of state law where *"there are no controlling precedents in the decisions of the Supreme Judicial Court."* The policy of the statute has been reiterated by the Maine Supreme Judicial Court in *White v. Edgar*, 320 A.2d 668, 675 (Me. 1974): "a concern to promote federal-state comity would counsel that, wherever reasonably possible, the state court of last resort should be given the opportunity to decide state law issues on which there are no state precedents which are controlling . . . " Moreover, the Justices of the Maine Supreme Judicial Court have been leading proselytizers for certification. See, e.g., comments of Justice Sidney W. Warnick at the Fourth Circuit Judicial

Conference in 1976: "I come as a salesman . . . I am an unabashed enthusiast of the certification procedure," quoted in Butzner and Kelly, *Certification: Assuring the Primacy of State Law in the Fourth Circuit*, 42 WASH. & LEE L. REV. 477, 452 (1985).

As Justice O'Connor said in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court." The Maine Supreme Judicial Court would welcome certification "to promote federal-state comity." This Court in *Lehman* recommended certification as a means of constructing "a cooperative judicial federalism." The First Circuit's policy of substantially limiting certification in diversity cases is destructive of comity and cooperation.

III.

THE POLICY OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT REGARDING CERTIFICATION IS A SUBSTANTIAL AND UNAUTHORIZED LIMITATION ON DIVERSITY JURISDICTION.

When petitioner commenced the present action in the Federal District Court in Bangor on May 24, 1985, he was fully aware of the total absence of Maine authority on the critical legal issues in the case.[2] He nonetheless chose to

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[2] Petitioner's principal cause of action is slander of title based on the filing of a lien against his boat which respondent

(Continued on following page)

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Bank knew or should have known was invalid against him as a "buyer in ordinary course" under the Uniform Commercial Code, Article 9-307(1). There is *no* authority in Maine jurisprudence on slander of title. Nonetheless, both parties agreed and the court below found that Maine would recognize a cause of action for slander of title. (App. 6) Respondent, however, pleaded in defence the "conditional privilege of a rival claimant" – a doctrine invented by Professor Prosser in his role as Reporter of the Restatement of Torts and whose very existence in the caselaw is highly debatable. While virtually every jurisdiction in the United States has recognized the cause of action for slander of title, very few have recognized the "conditional privilege." In fact there is only one case in this century (*Sinclair Refining Co. v. Jones Super Service Station*, 70 S.W.2d 562 (Ark. 1932) that can be said to have recognized the existence of such a doctrine and even that case is doubtful support for Professor Prossers' theory.

In the interests of clarifying the legal issues involved and expediting the resolution of this case, Cf. *Virginia v. American Booksellers Association*, 108 S. Ct. 636 (1988), at the time counsel for petitioner requested certification of the "conditional privilege" question, counsel also requested certification of a question concerning the interpretation of 11 M.R.S.A. Sec. 9-307(1), as the underlying premise of petitioner's case was that he was a "buyer in ordinary course" and therefore took free of any lien of the respondent Bank which was the creditor of the seller, Ocean Cruising Yachts. Despite the fact that there is *no Maine authority* on the interpretation of "buyer in ordinary course," the Federal District Court also refused to certify the question to the Maine Supreme Judicial Court and instead determined that Maine would interpret the phrase in a way that has been rejected by the vast majority of judges and scholars who have written on the subject. See e.g., Frisch, *Buyer Status Under the U.C.C.: A Suggested Temporal Definition*, 72 IOWA L. REV. 531,542 (1987) ("*Adamatic* departs . . . dramatically from what would otherwise be a uniform judicial position").

initiate this action in the Federal District Court for the precise reason that diversity jurisdiction was created – to protect himself, an out-of-state litigant, from any prejudice he might suffer from having his case against a local bank tried by a local jury. As Chief Justice Marshall observed in *Bank of the United States v. Deveaux*, 5 Cranch 61,87 (1909) " . . . the constitution itself . . . views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between . . . citizens of different states." See 13B C. WRIGHT, A. MILLER, E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601 (2d ed. 1984). These fears are still widely shared. See, e.g., Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L.REV. 178 (1965); Goldman & Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 JR. LEG. STUD. 93, 97-99 (1980); Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 LAW & SOC. REV. 749 (1980-81). Moreover, "it is only in the federal courts that an out-of-state litigant is always afforded the best available pre-trial and trial procedures, qualified judges with secure tenure and compensation. . . ." 1 J. MOORE, MOORE'S FEDERAL PRACTICE § 0.71[3. – 2] So there were good reasons for commencing this action in the Federal District Court. It never occurred to petitioner that by doing so he was waiving the possibility of obtaining a definitive ruling on the open questions of state law through the certification process.

IV.

THE POLICY OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT REGARDING WHEN A PARTY MAY REQUEST CERTIFICATION CONFLICTS WITH *LEHMAN*.

In *Lehman* petitioners initially requested certification on rehearing before the Second Circuit. 416 U.S. at 393. This Court did not consider the fact significant. In the case at bar, on the other hand, petitioner immediately requested certification after learning that the Magistrate's Proposed Findings and Recommendations astonishingly adopted *minority* views from other jurisdictions as the law of Maine. This was much earlier than the *Lehman* certification and was approximately *one year* before the District Court approved the Magistrate's findings. There was more than enough time to certify the open questions of state law without delaying the District Court decision. See C. SERON, CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES 15 (1983) (median time to obtain state court answer six months). Nonetheless, the court below held that petitioner's request was "*in extremis* maneuvering" (App. 20) and untimely, again quoting from the policy announced in *Cantwell v. University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977):

> "We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or in duplicating judicial effort."

Presumably, this language means that any request for certification must come before the District Court has ruled on the disputed issue of state law. Similar positions have been taken in other circuits. See, e.g., *Armijo v. Ex*

Cam, Inc., 843 F.2d 406 (10th Cir. 1988) ("We note that the plaintiff did not request certification until after the district court made a decision unfavorable to her."); *Perkins v. Clark Equipment Co.*, 823 F.2d 207(8th Cir. 1987) (practice of requesting certification after an adverse judgment has been entered should be discouraged); *Colonial Park Country Club v. Joan of Arc*, 746 F.2d 1425 (10th Cir. 1984) (citing *Cantwell*) *Complaint of McLinn*, 744 F.2d 677(9th Cir. 1984) (party should not be allowed a "second chance at victory" after district court has decided issue).

Although the "two bites at the cherry" policy is reasonable on its face, in practice it is an unworkable and pernicious policy whose only result is to limit certification of state law questions. For what it means is that the request for certification must follow shortly after the filing of the complaint, i.e. before the federal court has the opportunity to consider the state law issue. What is the federal court's reaction to be in such a situation? The most likely response is that "if you didn't want the issue resolved by the federal court, why didn't you sue in the state court"? This issue of when counsel can properly seek certification is a dilemma since virtually any request will be either too early or too late. The resolution to this dilemma is revealed by a closer reading of *Lehman*. Although the plaintiff in *Lehman* did not initially request certification until the rehearing in the Court of Appeals, the idea of certification was first suggested in the dissenting opinion at the Court of Appeals level. 416 U.S. at 389. Thus while a request by a party may be untimely, a decision to certify by the court can never be. It is the court which, in the exercise of its sound discretion, must decide whether and when a question should be certified

to the state court. Whether that discretion has been soundly exercised should depend upon whether certification would "save time, energy and resources and . . . [help] build a cooperative judicial federalism" as well as other guidelines to be indicated by this Court. It should *not* depend upon *when* counsel requested certification. That factor is simply *not* relevant, let alone determinative.

V.

IN ITS SUPERVISORY ROLE THIS COURT SHOULD ARTICULATE STANDARDS TO GUIDE THE EXERCISE OF "SOUND DISCRETION" BY THE LOWER FEDERAL COURTS IN THEIR DECISIONS ON WHEN TO CERTIFY A QUESTION OF STATE LAW TO THE HIGHEST COURT OF THE STATE.

In *Lehman* this Court said that the use of the certification procedure "in a given case rests with the sound discretion of the federal court." 416 U.S. at 391. In his concurring opinion, Chief Justice Rehnquest noted that "I think it appropriate to emphasize the scope of the discretion of federal judges in deciding whether to use such certification procedures." *Id.* at 392. The Chief Justice began this process by emphasizing that the lower federal courts should consider the additional costs in time and money that certification would impose on the parties. *Id.* at 395. But he also noted that *Lehman* was the first opportunity that this Court had to speak on "the use of certification procedures by the federal courts." *Ibid.* It clearly was premature at that time to attempt the task which the Chief Justice has identified for this Court. Petitioner suggests that that time has now arrived. See P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, THE FEDERAL

COURTS AND THE FEDERAL SYSTEM 1383 (3d ed. 1988). Based upon the experience of the lower federal courts it would appear that a court might well be justified in declining to certify a question of state law where the state law is clear and unlikely to change. See, *e.g.*, *Cantwell v. University of Massachusetts*, 551 F.2d 879 (1st Cir. 1977). On the other hand, certification might be presumed when there are no relevant state precedents on the questions before the court. In *Lehman* the Second Circuit found no Florida precedent "that was decisive so it then turned to the law of other jurisdictions . . . " 416 U.S. at 389. The Court of Appeals believed that it had reached a determination "as the Florida court would probably view it." *Ibid.* Nonetheless, a unanimous Supreme Court vacated the Court of Appeals judgment and remanded – not because the Court of Appeals had incorrectly predicted Florida law but because how Florida would decide the issue was unclear and because the certification procedure presented the opportunity to obtain a definitive statement of Florida law from a Florida court.

This Court should also take this opportunity to pronounce on what factors are not to be taken into account in the certification decision. This Court should make it clear that the fact that certification is requested by a plaintiff in a diversity action ought not in and of itself be grounds for denial. Nor should certification turn on when a party may have requested certification since, as noted above, a judge may certify a question at any time to further cooperative judicial federalism by allowing the state court to speak to unsettled questions of state law.

CONCLUSION

For these various reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Boston, Massachusetts
December 27, 1988

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APPENDIX

MAINE REVISED STATUTES ANNOTATED, TIT. 4, § 57 (1981)

When it shall appear to the Supreme Court of the United States, or to any court of appeals or district court of the United States, that there are involved in any proceeding before it one or more questions of law of this State, which may be determinative of the cause, and there are no clear controlling precedents in the decisions of the Supreme Judicial Court, such federal court may certify any such questions of law of this State to the Supreme Judicial Court for instructions concerning such questions of state law, which certificate the Supreme Judicial Court sitting as a law court may, by written opinion, answer.

MAINE REVISED STATUTES ANNOTATED, TIT. 11, § 9-307(1) (1981)

(1) A buyer in ordinary course of business (section 1-201, subsection (9)), other than a person buying timber, logs or pulpwood from a person engaged in timbering operations or from a person dealing in timber, logs or pulpwood and other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

E. G. FISCHER,
Plaintiff

vs.

BAR HARBOR BANKING & TRUST COMPANY,
Defendant

CIVIL NO: 85-0185-B

MEMORANDUM AND ORDER ACCEPTING MAGISTRATE'S RECOMMENDED DECISION

(Filed Sept. 22, 1987)

CONRAD K. CYR, Chief Judge

Plaintiff, a Massachusetts resident, is the owner of a sailboat constructed by Ocean Cruising Yachts of Maine, Inc. [OCY], a company which had obtained financing from defendant Bar Harbor Banking and Trust Company [the Bank]. Plaintiff sues the Bank, demanding compensatory and punitive damages for the alleged threatened conversion of the vessel, slander of title, and infliction of emotional distress, arising out of the Bank's assertion of a lien on the vessel. The complaint also seeks a judicial declaration that defendant does not have a lien on the vessel.

On September 27, 1985, plaintiff moved for a partial summary judgment, "complete in regard to the demand . . . for declaratory judgment but partial in regard to the demand . . . for compensatory and punitive damages."[1] On October 28, 1985, defendant moved to dismiss the complaint or for summary judgment on all issues.

On September 29, 1986, the United States Magistrate recommended the granting of defendant's motion for

summary judgment and the dismissal of plaintiff's claim for damages. The Magistrate recommended reserving judgment on the motion for declaratory relief pending the filing of a written statement within 30 days, demonstrating that the demand for declaratory judgment had not been mooted. The court undertakes *de novo* review of those portions of the Magistrate's recommended decision to which plaintiff has objected. 28 U.S.C. § 636(b).

I. *BACKGROUND*

The Bank began financing OCY operations in 1979. In February 1984, two OCY loans were consolidated, and the $200,000 consolidated loan was secured by a security interest in four boats, including the plaintiff's sailboat hull in progress "OC 39 Hull #XYG39001 1083 (Fischer)." The Bank filed its financing statement on March 12, 1984.

Pursuant to the $172,500 contract for the construction of plaintiff's sailboat, plaintiff had made progress payments in the total amount of $112,125 through March 27, 1984.

Plaintiff remained unaware of any loan arrangements between the Bank and OCY until early May 1984, when he was informed by Henry R. Hinckley III, president of OCY, that OCY was in serious financial trouble,[2] that its loan payments to the Bank were overdue and that the Bank claimed a lien on plaintiff's boat.

On May 19, 1984, plaintiff and Hinckley met with Mr. Avery, president of the Bank, at which time Avery took the position that the Bank would not release its lien on the four boats unless it received a $200,000 loan payment from OCY. The Bank's position was confirmed in writing

by John Reeves, vice president and treasurer of the Bank, who wrote to the plaintiff on June 13, 1984, stating that the Bank claimed a lien on his boat and would release its lien only upon payment of $50,000.

Instead of settling with the Bank, plaintiff supplied the Bank with an opinion letter drafted by his attorney, stating that plaintiff was a "buyer in the ordinary course of business" under Me. Rev. Stat. Ann. tit. 11, § 9-307(1) and, therefore, that the plaintiff was entitled to take free and clear of any lien of the Bank.

In late July 1984, plaintiff was informed by Hinckley that OCY was closing its doors. Plaintiff instructed Hinckley to move plaintiff's boat to another boatyard. The boat was removed without Bank interference.[3] Also in late July 1984, Hinckley signed a bill of sale, transferring title in the boat from OCY to Plaintiff. On the advice of the attorney for OCY, the bill of sale contained the following notation: "Manufacturers Warranty and Title is Given Subject to Bank Lien."

The following year, on May 24, 1985, plaintiff filed the present action. On October 25, 1985, the Bank filed termination statements with respect to the UCC filings on the four boats. Finally, on June 5, 1986, the Bank filed with this court a release of its lien on plaintiff's boat, dated May 16, 1986.

II. *DISCUSSION*

Plaintiff seeks a declaration that the Bank does not have a valid lien on his boat. Although the Bank has delivered a release to the plaintiff, stating that the Bank claims no security interest in the boat, plaintiff argues

that any prospective buyer would have to retain counsel to determine the invalidity of the lien noted in the bill of sale, and that this affects the vendibility of the boat. Plaintiff also asserts that defendant could refile its financing statement in Rhode Island, where the boat is located.

Plaintiff also seeks partial summary judgment on his claim for damages, asserting that the Bank "acted maliciously in regard to the tort of slander of title," *See* Plaintiff's Second Motion for Partial Summary Judgment. Plaintiff argues that the Bank, as an experienced lender, knew or should have known that plaintiff occupied the status of a buyer in the ordinary course of business under Me. Rev. Stat. Ann. tit. 11, § 9-307(1) and, therefore, that the Bank should have known that it did not have a valid prior lien on plaintiff's boat. Plaintiff claims that the Bank's assertion of a lien was made in bad faith, for the purpose of "extorting" $50,000 from plaintiff. Plaintiff seeks recovery of the legal expense incurred to clear the title to the boat, as well as damages for the emotional distress which the Bank's intentional or negligent conduct caused him.

The Bank argues that its assertion of a lien on plaintiff's boat was made in good faith, that it was OCY which included the reference to the OCY lien in plaintiff's bill of sale, without any direction from the Bank, and that, in any event, the Bank has relinquished any right it may have had in the boat by filing its UCC termination statements and by providing plaintiff with a release.

"The best and most inclusive name" for the tort of slander of title[4] "is that of 'injurious falsehood.'" W. Prosser, *The Law of Torts* § 122 at 939 (3d Ed. 1964).

Prosser identifies injurious falsehood, or disparagement, as "publication of matter derogatory to the plaintiff's title to his property . . . of a kind calculated . . . to interfere with his relations with others to his disadvantage." *Id.* at 943.

In this diversity action, the court looks to Maine law to determine the rights of the parties. However, since there is a dearth of Maine authority, it is necessry to look to the common law of other jurisdictions.[5]

In an action for slander of title, "plaintiff must show that there has been a malicious publication of false allegations concerning the title to his property causing special damages." *Markowitz v. Republic National Bank of New York,* 651 F.2d 825, 828 (2d Cir. 1981); *see also Landstrom v. Thorpe,* 189 F.2d 46 (8th Cir.), *cert. denied,* 342 U.S. 819 (1951); *Frega v. Northern New Jersey Mortgage Association,* 143 A.2d 885 (N.J. Super. Ct. App. Div. 1958). In other words, plaintiff must prove "falsity," "publication,"[6] "malice," and "special damages."[7] *See* Prosser, *supra,* § 122.

Malice is the "gist of the action" for slander of title. *Markowitz,* 651 F.2d at 828 (citing *Andrew v. Deshler,* 45 N.J.L. 167, 170 (N.J. 1883)). Although malice may be implied in some circumstances, *see, e.g., Gates v. Utsey,* 177 So.2d 486 (Fla. Dist. Ct. App. 1965) [malice may be inferred where information published is false, or without legal justification], where the defense of privilege is raised "the presumption of malice is rebutted and . . . the plaintiff must then prove actual or genuine malice in order to recover." *Id.* at 488.

The Bank asserts the qualified privilege of a "rival claimant." "A rival claimant is conditionally privileged to disparage another's property . . . by an assertion of an inconsistent legally protected interest in himself." Restatement (Second) of Torts § 647 (1977). According to the Restatement, a "claimant" is "one who asserts that he has property in land, chattels or intangible things. If two persons claim one or more of the same legally protected interests, they are 'rival claimants.'" *Id.* comment c.

In the circumstances of this case the Bank and plaintiff are "rival claimants." The gravamen of the slander of title action is that on March 12, 1984, when the Bank filed a financing statement asserting a security interest in the hull which plaintiff had contracted to buy, plaintiff was a "buyer in the ordinary course of business," *see* Me. Rev. Stat. Ann. tit. 11, § 9-307. Thus, on March 12, 1984, both the plaintiff and the Bank were asserting a property interest in the boat being constructed by OCY for plaintiff.

Since the Bank possessed the qualified privilege of a rival claimant, plaintiff has the burden of showing that the Bank did not have a good faith belief in the "possible validity of [its] claim," Restatement (Second) of Torts § 647 comment d (1977), but rather that it acted in knowing or reckless disregard of the truth, *see id.* § 623A. In particular, plaintiff has the burden of showing that the Bank knowingly or recklessly disregarded plaintiff's rights when it asserted a security interest in plaintiff's boat on March 12, 1984.

The Bank has produced affidavits stating that, in filing and asserting its lien against plaintiff's boat, it

acted on the basis of its experience as a commercial lender, as well as upon the provision in the contract between plaintiff and OCY which provides that title remains with OCY until the full purchase price has been paid. Plaintiff responds that, upon identification of the boat to the contract, plaintiff became a buyer in the ordinary course of business entitled to take the boat free from any lien created by the seller (OCY); that the Bank, as an experienced lender, should have known this; and, therefore, that the continued assertion of a lien by the bank was malicious.

As a matter of law, the Bank's assertion of a security interest in the boat being constructed for the plaintiff by OCY did not evidence malice on the part of the Bank. It is not clear under the Uniform Commercial Code that the Bank would not have prevailed had there been an actual contest for the right to possess the uncompleted vessel. In *Holstein v. Greenwich Yacht Sales, Inc.*, 404 A.2d 842 (R.I. 1979), the court took the position advocated by plaintiff, equating "identification" of goods to the contract, *see* U.C.C. §§ 2-401(1), 2-501, with a "purchase" that cut off the creditor's security interest. *See* 404 A.2d at 845. However, in *Chrysler Corp. v. Adamatic, Inc.*, 208 N.W.2d 97, 105-06 (Wis. 1973), the court held that a party with a contract to purchase goods was *not* a buyer in the ordinary course of business *until* title passed to the buyer. *See id.* at 106 (citing U.C.C. § 2-106(1): "a sale consists in the passing of title from the seller to the buyer for a price.")

Thus, although the caselaw is divided, a significant minority view holds that a purchaser of goods cannot become a buyer in ordinary course under U.C.C.

§ 9-307(1) before title to the goods has passed. *See generally, Chrysler Corp.*, 208 N.W.2d at 106-07 (discussing commentary considering when a contracting party becomes a buyer in the ordinary course). The issue had not been determined by the Maine courts prior to the time that the Bank perfected its security interest in plaintiff's boat. Under the terms of the contract between OCY and plaintiff, OCY held title to the boat which plaintiff had contracted to purchase at the time the Bank asserted its security interest. Accordingly, there was ample unsettled ground upon which the Bank could assert a good faith belief in the "possible validity of [its] claim," Restatement (Second) of Torts § 647, comment d (1977).

Therefore, the plaintiff has not satisfied the burden of setting forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Plaintiff has failed in particular to set forth facts sufficient to establish actual malice, which is an essential element of the cause of action for slander of title.[8] In their place, plaintiff has offered conjecture and conclusional allegations concerning the Bank's motives and state of mind. Plaintiff's allegations are insufficient to resist the present motion for summary judgment.

Plaintiff nevertheless argues that the Bank's motion for summary judgment should be denied, on the ground that there is a "serious credibility issue." Plaintiff's Objections to Recommended Decision, at 20. The argument is insufficient to withstand a properly supported motion for summary judgment. In *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2514 (1986), the Supreme Court stated:

> Respondents argue, however, that . . . the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), for this proposition. We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.

Accordingly, plaintiff's unsupported assertion that there is a credibility issue that must be decided by a jury is not enough to head off the Bank's motion for summary judgment.

There being no genuine issue as to any material fact, it is hereby *ORDERED* that defendant's motion for summary judgment on all issues be *GRANTED* and that plaintiff's motion for partial summary judgment, both with respect to plaintiff's claim for damages and with respect to plaintiff's demand for declaratory judgment,[9] be *DENIED*.

Dated at Bangor, Maine this 21st day of September, 1987.

/s/ Conrad K. Cyr
Chief Judge

ENDNOTES

[1] On March 3, 1986, plaintiff moved for summary judgment on the request for a judicial declaration that the defendant "acted maliciously in regard to the tort of slander of title."

[2] Subsequently, in a letter dated May 21, 1984, plaintiff was informed by counsel to OCY that OCY might declare bankruptcy.

[3] Plaintiff's boat was taken to Beal's Boat Yard in Bar Harbor, Maine, where construction was completed. Subsequently, on August 23, 1984, it was removed to Rhode Island. The Bank did not attempt to prevent its removal.

[4] Plaintiff also complains of a threat to convert and infliction of emotional distress. The former claim, although based on the Bank's assertion of a lien on plaintiff's boat, must be distinguished from slander of title. In order to be actionable, the Bank's conduct with respect to any alleged threat must have been "extreme" or "outrageous." W. Prosser, The Law of Torts § 11 (3d Ed. 1964). Plaintiff does not explicate this claim at any length, either in his pleadings or his memoranda, concentrating instread on the claim of slander of title. Similarly, the court first addresses the slander of title claim, which necessarily involves a resolution of the issue of defendant's conduct.

The claim of infliction of emotional distress is dependent upon plaintiff prevailing against the Bank on the underlying tort, *see Packard v. Central Maine Power Co.*, 477 A.2d 264, 268 (Me. 1984), in this case either slander of title or threatening to convert.

[5] As noted by the Magistrate, the closest analogue to the tort of slander of title for which Maine authority exists is the

tort of interference with advantageous business relationships. The Maine Supreme Judicial Court recently addressed the elements of this tort in *DiPietro v. Casco Northern Bank*, 490 A.2d 215 (Me. 1985), noting that Maine law requires that the plaintiff plead fraud or intimidation. In addition, the Maine Court has implied that *actual* interference with possession or use of property is an element of tortious interference with advantageous business relationships. *See Eastern Milling Co. v. Flanagan*, 130 A.2d 925 (Me. 1957).

In the present case, analogizing to the tort of interference with business relationships is not useful. Neither fraud nor intimidation, nor actual interference with the use or possession of property, is a necessary element of slander of title, nor has plaintiff alleged these elements. As a consequence, the court must look to the common law of jurisdictions which have recognized the tort of slander of title.

In his Objections to the Recommended Decision, at 22-23, plaintiff argues that the Maine Supreme Judicial Court should be asked to define the cause of action for slander of title, in particular the special damages element of the tort of slander of title and the affirmative defense of qualified privilege. In order for a question of law to qualify for certification to the Supreme Judicial Court, it is necessary that it appear that the response could be "determinative of the cause," Me. Rev. Stat. Ann. tit. 4, § 57, and could have "controlling impact on a decision of the merits of the cause," *Hiram Ricker & Sons v. Students International Meditation Society*, 342 A.2d 262, 264 (Me. 1975), *appeal dismissed*, 423 U.S. 1042 (1976).

The question of special damages would be determinative only if the Supreme Judicial Court were to hold that this element of the tort required plaintiff to establish impairment of vendibility, *see infra* note 7, in which case, plaintiff would be unable to state a cause of action for slander of title. However, since the court resolves plaintiff's claim on other grounds, it is not necessary to reach the issue of special damages. Accordingly, certification of this question to the Supreme Judicial Court would not be appropriate.

The question of qualified privilege could be determinative of the cause, were the Supreme Judicial Court to determine that defendant does not enjoy such a privilege. However, this

court does not find any significant split in authority among other jurisdictions with respect to the defense of qualified privilege. Both the element of malice and the defense of qualified privilege are well established in the caselaw. *See* 50 Am. Jur. 2d Libel and Slander §§ 544, 547 (1970). Accordingly, the dispositive issues in this case are not unresolved questions of law as to the elements of the tort of slander of title. Rather, determination of this cause turns upon whether the Bank has shown by a preponderance of the competent evidence that it enjoys a qualified privilege and whether plaintiff has proved by a preponderance of the evidence that the Bank acted with malice.

[6] The filing of liens, mortgages, and other emcumbrances is a sufficient publication to disparage or slander title. *See* Prosser, *supra*. Thus, it is not necessary for the defendant to have taken affirmative action to enforce its lien; mere refusal to release the lien may be actionable. *See, e.g., Markowitz*, 651 F.2d 825. But plaintiff must show that the publication was false. Plaintiff would have to prove that the Bank did not have a valid encumbrance on the boat, which would depend upon whether plaintiff was a "buyer in ordinary course of business," *see* Me. Rev. Stat. Ann. tit. 11, § 9-307(1).

The court does not reach that question, however, as it is not essential to a disposition of plaintiff's action. Thus, for the purposes of the pending motions for summary judgment, the court assumes, without deciding, that plaintiff has met the proof requirements of a "false publication."

[7] In many jurisdictions, proof of special damages, i.e., pecuniary loss, requires a showing that there was an impairment of vendibility. *See* Annotation, *What Constitutes Special Damages in Action for Slander of Title*, 4 A.L.R. 4th 532 (1981). In the present case, plaintiff complains of such an impairment due to the reference to a lien contained in his bill of sale. However, the adverse effect of this reference upon the vendibility of plaintiff's boat is conjectural. Plaintiff does not claim that he has attempted to sell the boat to a particular prospective buyer and that he has been impeded in doing so by the lien of the Bank. Absent such an unsuccessful attempt to sell, most courts requiring a showing that there has been an

impairment of vendibility have held that the claim is not actionable. *Id.* at 542-47.

Some jurisdictions, however, have held that an injured party has the right to recover, as special damages, the litigation expenses incurred in removing the effects of the slander, even in the absence of an impairment of vendibility. *Id.* at 560-62. *See also* Restatement (Second) of Torts § 633 (1977). In the present case, plaintiff predicates his claim to special damages on such litigation expenses.

The court, however, resolves plaintiff's claim on other grounds.

[8] Some facts alleged by plaintiff, e.g., the absence of a power of sale in the 1984 security agreement between the Bank and OCY, are irrelevant. Other facts, e.g., the failure of the Bank to obtain advice of counsel in response to a legal opinion by plaintiff's attorney, are in no way inconsistent with the Bank's exercise of its privilege as a rival claimant. At best, the facts cited by plaintiff merely invite conjecture regarding the Bank's motives for its actions. The Bank's efforts to protect its security interest were wholly justified under its qualified privilege "to disparage another's property . . . by an assertion of an inconsistent legally protected interest," Restatement (Second) of Torts § 647 (1977).

[9] Plaintiff seeks a declaratory judgment that the Bank does not have a lien upon his boat. However, as noted earlier, the Bank has relinquished any interest it may have had in the boat. On October 25, 1985, the Bank filed a termination statement with respect to its security interest. The Bank also has provided plaintiff with a release of its lien, signed by John P. Reeves, vice president and treasurer of the Bank, dated May 16, 1986. A copy of the release was filed with the court on June 5, 1986. As the Magistrate observed, this release "should resolve any question about any prospective claim of a lien on the boat by the Bank." Recommended Decision at 27. Accordingly, plaintiff's demand for declaratory judgment is moot.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DR. E. G. FISCHER,)
Plaintiff)
vs.)
BAR HARBOR BANKING)
AND TRUST COMPANY,)
Defendant)

JUDGMENT
(Filed Sept. 22, 1987)

Pursuant to the 'Memorandum and Order Accepting Magistrate's Recommended Decision' filed by the Court on September 22, 1987 in the above-entitled matter,

JUDGMENT is hereby entered for the defendant as against the plaintiff.

Dated at Bangor, Maine this 22nd day of September, 1987.

/s/ Illegible
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2068

DR. E.G. FISCHER,
Plaintiff, Appellant,

v.

BAR HARBOR BANKING AND TRUST COMPANY,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
[Hon. Conrad K. Cyr, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Coffin, *Circuit Judge*,
and Fuste,* *District Judge*.

Gilbert P. Verbit for appellant.

Thomas M. Brown with whom *John F. Barnicle* and *Eaton, Peabody, Bradford & Veague* were on brief for appellee.

SEPTEMBER 9, 1988

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*Of the District of Puerto Rico, sitting by designation.

FUSTE, *District Judge.* Plaintiff-appellant, Dr. E. G. Fischer ("Fischer"), appeals from a summary judgment of the district court dismissing his diversity action for slander of title against the defendant-appellee Bar Harbor Banking and Trust Company ("Bank"). *Fischer v. Bar Harbor Banking & Trust Co.*, 673 F.Supp. 622 (D.Me. 1987). Fischer contends the Bank committed these misdeeds in asserting a lien on a sailboat being constructed for him by Ocean Cruising Yachts of Maine, Inc. ("OCY"). For the reasons set forth below, we affirm.

I.

In 1983, Fischer entered into a contract with OCY for the construction of a custom-built sailboat at a total cost of $172,000. Under the terms of the contract, which required periodic progress payments, title would not pass from OCY to Fischer until Fischer paid the full purchase price and until OCY made delivery to him. At the time of contracting, Fischer was neither aware of any loan arrangements between OCY and the Bank, nor of any lien or security interests the Bank held against OCY property. We note that Fischer did not require OCY to provide a performance bond, a requirement often imposed by commercially sophisticated customers in similar circumstances.

By March 27, 1984, Fischer had made $112,125 in progress payments to OCY. Nonetheless, OCY, whose operations were financed by the Bank since 1979, was experiencing financial difficulties, particularly with its cash flow. To deal with this, in February 1984, the Bank consolidated two existing $100,000 loans to OCY into one

loan. As guarantee for this new single obligation, OCY executed in favor of the Bank a promissory note for $200,000 and entered into a security agreement over four hulls in progress, including Fischer's sailboat hull. *See* Me.Rev.Stat.Ann. tit. 11, §§ 9-101-113. On March 12, 1984, the Bank filed with the Maine Secretary of State the financing statement in order to perfect its security interest.[1]

Fischer remained unaware of OCY's relation with the Bank and its financial troubles until the spring of 1984. In May, the president of OCY, Henry R. Hinckley III, informed Fischer that OCY was in serious financial trouble, its loan payments to the Bank were overdue, and the Bank claimed a lien on four sailboats, including his craft-in-progress. On May 19, 1984, Fischer, Hinckley, and the president of the Bank, Mr. Avery, met in an effort to resolve the situation. At that meeting, the Bank would not agree to release its security interest on the four boats unless OCY made a $200,000 loan payment. The Bank confirmed this position in writing, with a June 13, 1984

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[1] Since 1979, and without Fischer's awareness, the Bank provided OCY with a form of interim financing for the shipbuilding operation. It granted loans to OCY against inventory, hulls in progress, and accounts receivable. At times, the Bank rolled over loans to give economic breathing space to the shipyard. A rolled-over loan is nothing more than an extension on a previously binding obligation. Eventually, the buyer of the hull would secure his own financing for the actual purchase. Banks roll over loans as a matter of commercial discretion and economic risk in order to assist those in need of financial relief and to maintain clients. Contrary to Fischer's claim, we do not see any impropriety in this common commercial practice followed by financial institutions worldwide.

letter to Fischer from its vice-president and treasurer, John Reeves, stating the Bank would release its lien on Fischer's craft only upon a $50,000 payment. The Bank also sought $50,000 payments from each of the other three boat owners. The attorney for OCY, reacting to OCY's financial troubles, in a May 21, 1984 letter to the four prospective boat owners proposed a payment plan, and agreed that the Bank's lien was superior to their interests in the hulls.

Fischer later responded with a letter to the Bank drafted by his lawyer, contending that he was a "buyer in ordinary course of business" and, therefore, took free and clear of any security interest held by the Bank. Me.Rev.Stat.Ann. tit. 11, § 9-307(1). Thereafter, in July 1984, Hinckley informed Fischer that OCY was terminating operations. Fischer requested the removal of his boat to another shipyard, which was accomplished without the Bank's interference. Construction was completed in August of 1984. In the same month, Hinckley signed a bill of sale transferring title in the boat from OCY to Fischer that contained the following proviso: "Manufacturers Warranty and Title is Given Subject to Bank Lien." This condition was included at the advice of the attorney for OCY. The Bank was not aware of this inclusion.

On May 24, 1985, Fischer filed suit in federal court. On October 25, 1985, the Bank filed termination statements with the Maine Secretary of State regarding the UCC secured interest on the four boats. On June 5, 1986, the Bank filed with the district court a release of its lien on Fischer's boat.

II.

The focus of Fischer's case for damages was that the Bank's March 12, 1984 UCC financing statement covering his hull and its continued assertion of a lien constituted slander of title to the sailboat. He contended that the Bank should have known that he was a buyer in ordinary course, and that the Bank was only trying to extract or extort $50,000 from him. Fischer also sought a declaration that the Bank had no valid lien. The Bank answered that the lien was asserted in good faith and before title passed to Fischer, or, in other words, that it possessed the conditional privilege or a rival claimant. Fischer moved for summary judgment on the request for declaratory relief, and partial summary judgment on his damage claim. Shortly thereafter, the Bank moved to dismiss the complaint or for summary judgment on all issues. Fed. R. Civ. P. 12(b) and 56.

Before disposition of these motions, a U.S. Magistrate's Recommended Decision scuttled Fischer's theory. The Magistrate recommended that the district court grant the Bank's motion and dismiss Fischer's damage claim. He further recommended that the court reserve judgment on the motion for declaratory relief pending a written statement that the demand for declaratory judgment had not been mooted. Fischer filed objections to the recommendation and resorted to *in extremis* maneuvering by requesting certification to the Maine Supreme Judicial Court of the issues of state law regarding slander of title. The district court declined, and on *de novo* review, held that the Bank possessed the conditional privilege of a rival claimant, that Fischer did not set forth specific facts to establish actual malice, an element of his slander

action, and that because the Bank filed the termination statement and a release of its lien, his request for declarartory relief was moot.

III.

Fischer's main contention on appeal is that the district judge abused his discretion in denying his request to certify to the Maine Supreme Judicial Court the following issues on which there exists no Maine authority: (1) whether Maine jurisprudence would recognize the doctrine of "qualified privilege of a rival claimant" in an action for slander of title, (2) if so, whether the Bank is a "rival claimant" within the meaning of that privilege. On appeal, for the first time Fischer argues that the district court should have certified an additional issue: (3) whether he is a "buyer in ordinary course of business" under Me.Rev.Stat.Ann. tit. 11, § 9-307(1). We find no abuse of discretion on the part of the district court. Certification was not in order.

The decision whether to certify a state law issue to the state's high court "in a given case rests in the sound discretion of the federal court."[2] *Lehman Bros. v. Schein,*

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[2] The decision is guided in some part by whether the state maintains a cetification procedure. *Lehman Bros. v. Schein,* 416 U.S. 386, 391-2 (1974). Maine does. Pursuant to Me.Rev.Stat.Ann. tit. 4, § 57:

> When it shall appear to . . . [any federal court], that there are involved in any proceeding before it one or more questions of law of this State, which may be determinative of the cause, and there are no clear controlling precedents

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416 U.S. 386, 391 (1974). "The purpose of certification is to ascertain what the state law is . . . " *Tarr v. Manchester Insurance Corp.*, 544 F.2d 14, 15 (1st Cir. 1976). However, "[i]n the absence of a definitive ruling by the highest state court, a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.'" *Michelin Tires, etc. v. First National Bank of Boston*, 666 F.2d 673, 682 (1st Cir. 1981).

With regard to the recognition of the conditional privilege of a rival claimant,[3] the district court found no

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> in the decisions of the Supreme Judicial Court, such federal court may certify . . . for instructions concerning such questions of state law, which certificate the Supreme Judicial Court sitting as a law court may, by written opinion, answer.

We regard this statute as more than merely a basis of jurisdiction. As the Maine Supreme Judicial Court stated, "a concern to promote federal-state comity would counsel that, wherever reasonably possible, the state court of last resort should be given opportunity to decide state law issues on which there are no state precedents which are controlling. . . ." *White v. Edgar*, 320 A.2d 668, 675 (Me. 1974). Furthermore, certification saves "time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. at 392 (footnote omitted). Nonetheless, for the reasons enunciated in the text, the district court properly denied certification.

[3] Fischer apparently concedes that even in the absence of Maine law, there is sufficient, uniform common law of other jurisdictions to determine the elements of a cause of action for slander of title. "[P]laintiff must show that there has been a malicious publication of false allegations concerning the title to his property causing special damages." *Markowitz v. Republic National Bank of New York*, 651 F.2d 825, 828 (2nd Cir. 1981).

"significant split in authority among other jurisdictions." *Fischer*, 673 F.Supp. at 625 n.5. We think the district court correctly found no real debate in the law that one who maintains a competing claim to an interest in the property of another is conditionally privileged to assert a lien on that property in order to preserve his interest. *See Restatement (2nd) of Torts* ("Restatement") § 647 comment g (1977). With this right, a "rival claimant is conditionally privileged to disparage another's property in land, chattels or intangible things by an assertion of an inconsistent legally protected interest in himself." *Restatement* § 647.[4]

The court properly decided, first, that the Bank effectively became a rival claimant and, second, that the Bank was entitled to assert the privilege. At the time that the Bank perfected its security interest, both had a legally protectable interest in the hull: Fischer contracted OCY for its construction and made almost three-quarters of its purchase price in progress payments, and the Bank had secured $200,000 in earlier loans with this hull and other boats under construction.[5]

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[4] We feel comfortable, as the district court did, in applying the *Restatement*, a widely respected treatise on tort law. We note that the Maine Supreme Judicial Court has referred to the *Restatement* in establishing Maine law with regard to the tort of interference. *Harmon v. Harmon*, 404 A.2d 1020, 1024 (Me. 1979). Furthermore, there is no authority conflicting with the *Restatement* regarding the conditional privilege of a rival claimant.

[5] "A common form of asserting such a claim is the filing for record of a lien or other encumbrance." *Restatement* § 647 comment g.

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We find Fischer's request for certification particularly inappropriate here. As plaintiff, he had knowledge of the state of the law under his theories for recovery, and had the choice of forums to file suit, either in the local courts or the federal court under diversity jurisdiction, 28 U.S.C. § 1332. As this court has previously stated:

> [O]ne who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification. We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort.

Cantwell v. University of Massachusetts, 551 F.2d 879, 880 (1st Cir. 1977); *see also Venezia v. Miller Brewing Co.*, 626 F.2d 188, 192 n. 5 (1st Cir. 1980). Furthermore, his seeking certification on the issue of buyer in ordinary course is made for the first time on appeal. Though the failure to raise the issue would not necessarily prevent our certifying at this late stage, it considerably weakens plaintiff's insistence on his right to certification. *Cf., Perkins v. Clark Equipment Co.*, 823 F.2d 207, 210 (8th Cir. 1987). We take a dim view of Fischer's attempt to circumnavigate the reach of the district court on an issue not properly before the court. We note that in his complaint, Fischer sought a declaration that the Bank had no valid lien on the sailboat, rather than a declaration that he was a buyer in ordinary course.

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Under the *Restatement*, section 647, a rival claimant may only assert the privilege if he has a good faith belief in its possible validity. Comment d. As the appellant correctly noted, this requires plaintiff to prove actual malice, or in other words, to prove that the rival claimant "acted in knowing or reckless disregard of the truth" in disparaging plaintiff's property. *Fischer*, 673 F.Supp. at 626.

IV.

Moving to the district court's other substantive determinations, we agree that Fischer provided insufficient evidence to show that the Bank acted with malice in filing its March 12, 1984 filing statement, and continuing to assert a lien on the unfinished sailboat. In deciding this issue, the court correctly determined that it was of no consequence whether, in order to judge actual malice, Fischer occupied the esteemed position of buyer in ordinary course.[6] Whether Fischer is a buyer in ordinary course is not the issue. The issue is whether the answer to that question was so obvious as to constitute a finding that the Bank acted with actual malice. For both legal and factual reasons, the answer to this inquiry is no. Though a review of the authorities cited in the district court opinion indicates that in a contest for possession of the hull Fischer could have won on the merits, *see Holstein v. Greenwich Yacht Sales, Inc.*, 404 A.2d 842 (R.I. 1979) (identification of the goods of the contract cuts off the creditor's security interest), there is support for the Bank's position, *see Chrysler Corp. v. Adamatic, Inc.*, 208 N.W.2d 97 (Wis. 1973) (buyer does not become buyer in ordinary course until title passes to buyer). Fischer, in his brief on

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[6] A buyer in ordinary course is a "person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker." Me.Rev.Stat.Ann. tit. 11, § 1-201(9). He "takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." Me.Rev.Stat.Ann. tit. 11, § 9-307(1).

appeal, makes much of commentators' negative criticism of the *Adamatic* case, but offers no authority in support of his claim that he was a buyer in ordinary course at the time the Bank perfected the secured transaction. Fischer ignores the fact that under the hull construction contract with OCY, title to the boat would not pass until the full purchase price had been paid.[7] Under the *Adamatic* case, the Bank had sufficient legal authority to support its position. Having structured the ship's construction contract under the *Adamatic* approach, the appellant stands on thin ice in disclaiming the application of that particular view. What existed at this point were competing claims to a superior interest between the two parties. The Bank, like Fischer, was at least entitled to press its right to superiority before relinquishing it in the judicial setting.[8]

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[7] The passing of title to the buyer carries certain risks, rights, and responsibilities for the buyer, *e.g.*, insuring against the risk of loss and paying certain taxes.

[8] Fischer contends that in a related case brought by another of the four OCY boat owners against OCY and the Bank, the district court ruled a similar Bank lien invalid. *See David Pyles v. Bar Harbor Banking & Trust Co.*, No. 84-0227-B (D.Me. July 27, 1984). He further contends that, in light of this decision, the Bank lawyer's August 3, 1984 letter to Fischer, stating the Bank had a security interest in his hull, is objecitve evidence of malice. However, contrary to what Fischer maintains, the district court did not rule the lien invalid, but granted a preliminary injunction allowing the boat owner to remove his hull from OCY property subject to his providing a surety bond and a certificate or property insurance coverage. All legal options remained open. The letter is not inconsistent with the preliminary injunction and is, therefore, no evidence of malice.

Lastly, merely because Fischer's lawyer asserted in an extrajudicial letter that Fischer was a buyer in ordinary course does not mean the Bank had to drop sails and paddle home. Institutions who hand out loans to businesses are expected to protect their investments in order to decrease their exposure to monetary loss. The Bank merely acted in accordance with its customary practice with OCY. *See* footnote 1, p. 3. Moreover, it was OCY's attorney who took the position that the Bank had a priority interest over the four sailboat buyers. OCY, not the Bank, included the qualification on the bill of sale that the purchase was subject to the Bank's lien. The facts, together with the status of the law, seen as a whole, are insufficient to establish malice on the part of the Bank.

V.

We conclude that the district court properly denied certification that Maine jurisprudence would recognize the conditional privilege of a rival claimant in a slander of title action, and that the district court properly applied the privilege to the facts.

The decision of the district court is affirmed.

Dubitante follows.

COFFIN, *Circuit Judge* (dubitante). I respectfully question whether the district court properly granted summary judgment on the issue of the Bank's malice. Although the evidence of malice in this case is not strong, I do not believe a jury would be foreclosed from finding that the Bank acted maliciously, and therefore was not entitled to exercise the privilege of a rival claimant.

In an affidavit, Bank President Robert Avery stated that he continued to believe the Bank's liens on the four boats were superior to the interests of the boat buyers "*until* the point in time when this Court rendered a decision in the case of *David Pyles v. Ocean Cruising Yachts of Maine, Inc. and Bar Harbor Banking & Trust Company, No. 84-0227-B.*" (Emphasis added.) In the *Pyles* case, the district court granted a preliminary injunction allowing Pyles – another of the four boat buyers whose boats were involved in the OCY-Bar Harbor security arrangement – to remove his boat from OCY's shipyard upon his furnishing a surety bond and a certificate of property insurance coverage. Despite Avery's statement implying that he no longer believed the lien was valid as of the time of the *Pyles* decision, which was issued July 25, 1984, the Bank's lawyer on August 3 sent a letter to Fischer asserting the Bank's security interest in the boat and noting that the Bank would be entitled to any improvements Fischer decided to make on the vessel.

I believe that Avery's affidavit supports plaintiff's argument that a factual dispute, based on objective evidence, remains on the issue of malice.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2068

DR. E.G. FISCHER,
Plaintiff, Appellant,

v.

BAR HARBOR BANKING AND TRUST COMPANY,
Defendant, Appellee.

ERRATA SHEET

The opinion of this Court issued on September 9, 1988 is amended as follows:

The sixth and seventh lines of page 2 are amended to read:

"Fischer contends the Bank committed this misdeed in asserting a lien on a sailboat . . . "

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2068

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Defendant, Appellee.

JUDGMENT

Entered: September 9, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by Counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
/s/ Francis P. Scigllano
Clerk.

[cc: Messrs. Verbit and Brown]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-2068

DR. E.G. FISCHER,
Plaintiff, Appellant,

v.

BAR HARBOR BANKING AND TRUST COMPANY,
Defendant, Appellee.

Before
Campbell, *Chief Judge*,
Coffin, *Circuit Judge*,
and Fuste,* *District Judge*.

ORDER OF COURT

Entered: October 5, 1988

Upon consideration of appellant's petition for rehearing, It is ordered that said petition be, and the same hereby is, denied.

By the court:
/s/ Francis P. Scigllano
Clerk

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*Of the District of Puerto Rico, sitting by designation

[cc: Messrs. Verbit and Brown]